

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 16 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

ROBERT H.,	)	2 CA-JV 2010-0036
	)	DEPARTMENT B
Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
ARIZONA DEPARTMENT OF ECONOMIC	)	Appellate Procedure
SECURITY and GABRIEL G.,	)	
	)	
Appellees.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100JD200700075

Honorable Joseph R. Georgini, Judge

AFFIRMED

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ECKERSTROM, Judge.

¶1 In an order entered on February 3, 2010, the juvenile court terminated the parental rights of appellant Robert H. to his son Gabriel G., who was then two years old. Robert did not contest the allegations of an amended dependency petition when Gabriel was adjudicated dependent in June 2009. He likewise stipulated at the termination hearing held on October 29 and December 17, 2009, that the statutory grounds alleged for severance had been established.<sup>1</sup> Robert objected below solely on the ground that terminating his rights was not in Gabriel’s best interests, and his challenge to the court’s contrary finding is the sole issue he presents in this appeal. We affirm.

¶2 To terminate parental rights, a juvenile court must find the existence of at least one of the statutory grounds for termination enumerated in A.R.S. § 8-533(B) and “shall also consider the best interests of the child.” *Id.* Although statutory grounds for termination must be proven by clear and convincing evidence, only a preponderance of the evidence is required to establish that severance will serve the child’s best interests. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we conclude as a matter of law that no reasonable person could find the essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep’t of Econ. Sec.*, 221 Ariz. 92, ¶ 9, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to upholding the court’s order. *Manuel M. v. Ariz. Dep’t of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

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<sup>1</sup>The statutory grounds on which the juvenile court ordered Robert’s parental rights terminated were chronic substance abuse, *see* A.R.S. § 8-533(B)(3); Robert’s felony conviction and the length of his resulting prison sentence, *see* § 8-533(B)(4); and Gabriel’s out-of-home placement for longer than six months before he was three years old, *see* § 8-533(B)(8)(b).

¶3 Gabriel was born fifteen days before Robert's twenty-first birthday. Both Robert and Gabriel's mother, Angel, had been methamphetamine users, and Robert testified to a long history of drug use that had begun when he was approximately twelve years old. He also has an extensive criminal history that includes three felony convictions and, by Robert's estimation, as many as twenty arrests.

¶4 At the time of the termination hearing, Robert was incarcerated and had served approximately eleven months of a 2.5-year sentence imposed for a third-degree burglary committed in November 2008. His sentence expiration date is May 2011, by which time Gabriel will be over three years old. Robert estimated he would need three or four months after his eventual release before he could find employment and housing and be ready to assume responsibility for Gabriel. Robert further testified that Gabriel had never lived with him, that he had never been responsible for his son's care for more than an hour, and that Gabriel does not recognize Robert when shown a photograph of him. Other witnesses testified Robert had seen Gabriel only two or three times. In short, Robert had no existing relationship with Gabriel, even before he was incarcerated.

¶5 In approximately July 2008, Angel left Gabriel in the custody of Robert's seventy-eight-year-old grandfather, Robert P., who became Gabriel's primary caretaker until April 2009. Gabriel had bonded with his great-grandfather and the two have a close relationship. On April 10, 2009, however, Child Protective Services (CPS) took Gabriel into custody because it believed Robert P. had allowed Angel and her family to have unauthorized contact with Gabriel.

¶6 Upon removal from his great-grandfather's custody, Gabriel was placed in the adoptive foster home where he remained at the time of the termination hearing. The

CPS case manager testified that his foster parents, who are licensed to adopt him, are “involved in Gabriel’s life” and are meeting all of his needs in a stable, permanent, drug-free environment. She testified that Gabriel is adoptable; that he would benefit from the termination of Robert’s parental rights by achieving stability, safety, and permanency in an adoptive family; and that she believed severance and adoption were in Gabriel’s best interests. The record thus contains evidence sufficient to support the juvenile court’s finding that, “[d]ue to the circumstances that this family is suffering from,” terminating Robert’s parental rights is in Gabriel’s best interests.

¶7 Robert argues the Arizona Department of Economic Security (ADES) failed to prove that he was unable to parent, that continuing his parental relationship would be dangerous or detrimental to Gabriel, or that providing further reunification services to Robert after he is released from prison would be futile. But Robert conceded in testimony that he is currently unable to parent by virtue of his imprisonment. And the latter issue, whether ADES “has made a diligent effort to provide appropriate reunification services,” § 8-533(B)(8), is relevant only to the existence of certain enumerated statutory grounds for termination, not to the matter of the child’s best interests. Because Robert stipulated at the severance hearing that statutory grounds for termination do exist and objected on the sole basis that severance was not in Gabriel’s best interests, we do not address his argument that “ADES failed to make a concerted effort to preserve the familial relationship.”

¶8 A juvenile court may find that terminating parental rights will serve the best interests of the child if a preponderance of the evidence establishes the child will benefit from severing the relationship or be harmed by its continuance. *See In re Maricopa*

*County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990) (best interests served if terminating parent’s rights confers benefit on child); *In re Maricopa County Juv. Action No. JS-501904*, 180 Ariz. 348, 352, 884 P.2d 234, 238 (App. 1994) (freeing child for adoption can be benefit resulting from severance). In assessing best interests, the court may consider whether the child’s present placement is meeting the child’s needs, *In re Maricopa County Juv. Action No. JS-8490*, 179 Ariz. 102, 107, 876 P.2d 1137, 1142 (1994); whether the child is adoptable, *Maricopa County No. JS-501904*, 180 Ariz. at 352, 884 P.2d at 238; and whether there is an existing plan for adoption. *Audra T. v. Ariz. Dep’t of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998). However, “the court does not ‘weigh alternative placement possibilities to determine’ if severance is in the child’s best interests.” *Antonio M. v. Ariz. Dep’t of Econ. Sec.*, 222 Ariz. 369, ¶ 2, 214 P.3d 1010, 1012 (App. 2009), *quoting Audra T.*, 194 Ariz. 376, ¶ 5, 982 P.2d at 1291.

¶9 Here, the crux of Robert’s claim is his assertion that he will be able to parent Gabriel within a few months after his release from prison and, in the meantime, his now-eighty-year-old grandfather remains “a suitable guardian” for two-year-old Gabriel until Robert is ready to assume his parental responsibilities. Even were we to accept Robert’s contentions on both points as true beyond any qualification or dispute, the juvenile court was nonetheless entitled to consider the instability that had characterized Gabriel’s first two years of life, the fact that he did not know or have a relationship with Robert, the child’s need for and entitlement to permanency, the immediate availability of an appropriate adoptive placement, and the fact that his prospective adoptive family was already meeting his needs. *See id.* In effect, the court weighed Robert’s evidence and

arguments against those ADES presented and found a preponderance of the evidence established that severing Robert's rights and freeing Gabriel for adoption was in the child's best interests. It is the juvenile court's function to observe the parties, judge the credibility of witnesses, weigh the evidence, and make appropriate factual findings. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002); *In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987). When reasonable evidence supports those findings, we will not disturb them. *Jesus M.*, 203 Ariz. 278, ¶ 4, 53 P.3d at 205.

¶10 The evidence in this record amply supports the juvenile court's finding that severance was in Gabriel's best interests. Accordingly, we affirm its order terminating Robert's parental rights to Gabriel.

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge